Produce Warehouse of Coram, Inc. *and* United Food and Commercial Workers, Local 342–50, AFL–CIO. Case 29–CA–22012

October 27, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN AND BRAME

On June 15, 1999, Administrative Law Judge Steven Fish issued the attached decision. The Union filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Richard A. Bock, Esq., for the General Counsel.
Brian K Saltz, Esq., of Farmingdale, New York, for the Respondent.
Martin Milner, Esq. (*Simon & Milner),* of Valley Stream, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

STEVEN FISH, Administrative Law Judge. Pursuant to charges filed by United Food and Commercial Workers Union, Local 342-50, AFL–CIO (the Union or the Charging Party), the Regional Director for Region 29 issued a complaint and notice of hearing against Produce Warehouse the Respondent, on October 30, 1998,[1] alleging violation of Section 8(a)(1) and (3) of the Act by discharging its employee Richard Davis.

The case was initially consolidated for trial with Cases 29–CB–10601 and 29–CP–614 which alleged that the Union had violated Section 8(b)(7)(C) and (1)(A) of the Act. Prior to trial the Union entered into a settlement agreement, and those cases were severed from the instant matter.

At the trial, which was held before me in Brooklyn, New York, on January 21, 1999, the complaint was amended to reflect the correct name of Respondent as Produce Warehouse of Coram, Inc. Briefs have been filed by the General Counsel and the Respondent and have been carefully considered. On the entire record including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

The Respondent is a New York corporation engaged in the operation of retail grocery stores, including a facility located in Coram, New York.

Annually, the Respondent derived gross revenues in excess of $500,000 and purchased and received at its Coram facility goods and supplies valued in excess of $5000 directly from entities located outside the State of New York.

The Respondent admits, and I so find that it is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is also admitted and I so find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS

Richard Davis began his employment for the Respondent in mid-September 1997 at its Coram, New York store as a butcher. In February 1998 he was transferred to Respondent's West Islip store. In April 1998, he was transferred back to the Coram location.

During his employment at the Respondent's two stores, after meeting with Donald Proniewych and Fred Steiniger, officials of the Union, Davis spoke to employees at both locations concerning the benefits of joining the Union. Davis also signed an authorization card on behalf of the Union on March 16,1998.

The General Counsel adduced no direct evidence that Respondent was aware of Davis' activities in speaking to employees on behalf of the Union. In fact Davis admitted that no one from management was aware of his support for the Union, until he wore a union hat, as described more fully below.

In early May, Davis met with Steiniger and suggested to Steiniger that to speed up the organizing, Davis should be provided with a union hat, which Davis would wear while at work. The next day, Steiniger brought Davis a blue baseball cap with the logo UFCW Local 342-50 prominently displayed thereon. The union logo measured 1-1/4 inches high and 4 inches in length.

On May 5, Davis testified that he wore the union hat during his entire workday. According to Davis, Store Manager Remy Bell and Eddie Bell one of the owners, saw him wearing the hat, but said nothing to him about it on that day, although he wore it for his entire shift.

Davis was off on May 6, but on May 7 he reported to work again, and once more he wore the union hat. At some point during that day, Eli Ruperto, Respondent's meat supervisor arrived at the store. He began walking around the store, accompanied by Respondent's assistant manager, Joseph Delmonte. From about 15 feet away, both Delmonte and Ruperto noticed that Davis was wearing a hat[2] but was not wearing the hat distributed by and required by the Respondent to be worn by its employees.

Delmonte commented to Ruperto, that Davis was out of uniform, since he was not wearing a Produce Warehouse hat. At that point neither of them could tell that it was a union hat that Davis was wearing. Ruperto and Delmonte then approached Davis by the customer service window. When they spoke to him they could see that Davis was wearing a union hat.

Delmonte told Davis that he should take off the hat that he was wearing, because he was out of uniform and in violation of company policy. Delmonte added that Davis should put on a Produce Warehouse hat. Davis replied no, because he believed in the hat and believed in the Union. Ruperto then told Davis to remove the hat and put on a company hat. Davis responded no. Ruperto replied that "it is your decision to make, either remove

[1] All dates are in 1998 unless otherwise indicated.

[2] Ruperto was the meat supervisor for all of the Respondent's stores.

the hat, put on a company hat and follow company policy, or punch your card and leave."

Although both Ruperto and Delmonte told Davis to put on a produce warehouse hat, as well as to take off the union hat, neither Delmonte nor Ruperto had a produce warehouse hat with them at the time, and did not physically offer Davis a company hat to wear. However, there were produce warehouse hats available in the office and in Ruperto's car at the time.

Davis repeated that he was not going to take off the hat. Ruperto then instructed Davis to punch his card and leave, and return the timecard to Ruperto. Ruperto also asked Delmonte if he had heard what Davis said, and instructed Delmonte to write a report exactly the way it happened.

Davis complied with Ruperto's orders, punched out and handed his card to Ruperto. Ruperto then informed Davis, "You're out of here," and then added that Davis should tell one of the Union's business agents, "its not going to be that easy."

In connection with that latter comment, Ruperto admitted that he was aware that the Union was organizing the Company, and that he believed that Davis was wearing the union hat, because Davis was looking to get the Union into the Company. Therefore, Ruperto's comment to Davis to tell the union representative, "its not going to be that easy," was referring to Ruperto's view that it was not going to be that easy to organize Respondent's employees. With respect to this issue, Ruperto, who was a former union member, had previously interceded with Avi Raitses, the Respondent's president, at the behest of Ralph Cartrophie an official of the Union, to attempt to persuade Respondent to recognize and agree to a contract with the Union. In fact, Cartrophie and Raitses had a conversation concerning the terms for a possible contract, but no agreement was made by Respondent either to recognize or sign a contract with the Union.

My findings above with respect to the events of May 7, is based on a compilation of the credited portions of the testimony of Davis, Ruperto, and Delmonte, as well as an evaluation of two written reports prepared by officials of Respondent concerning the day in question. These documents include a report prepared by Delmonte, which made reference to the hat worn by Davis as a "Local 342 Hat." The other document was prepared by Manager Bell, based on his oral reports of the incident from Ruperto and Delmonte. The Respondent sought to introduce this document as a business record. I received it, subject to further argument and consideration. While I doubt that this document would qualify as a business record, I affirm my ruling to receive the document into evidence, and I have considered it in making my factual findings. Thus the Board has frequently relied on hearsay testimony, which was "rationally and corroborated by something more than the slightest amount of other evidence." *Dauman Pallet*, *Inc*., 314 NLRB 185, 186 (1994); *Livermore Joe's Inc*., 285 NLRB 169 fn. 3 (1987); *RJR Communications, Inc.,* 248 NLRB 920, 921 (1980); *Midland Hilton & Towers,* 324 NLRB 1141 fn. 1 (1997); *Sheet Metal Workers Local 28 (Astoria Mechanical),* 323 NLRB 204, 209 (1997).

Here while the report prepared by Bell, is based on "hearsay" reports of the events in question, it is corroborated by the credible and consistent testimony of Ruperto and Delmonte, and is clearly rationally probative. Indeed, the only significant credibility dispute between Davis and Respondent's witnesses, is whether Davis was instructed to put on a Produce Warehouse hat, in addition to removing the union hat, as testified to by Delmonte and Ruperto. Davis insists however that he was not told anything about putting on a produce warehouse or company hat, but only ordered to remove his union hat. Davis further testified that he did not have his produce warehouse hat with him on that day, and had Respondent offered him a Produce Warehouse hat, he would have worn it.

I find Davis' testimony in that regard to be preposterous and incredible. Since he had already adamantly refused to remove the union hat twice, while insisting that he believed in the hat and believed in the Union, it is clear that Davis was determined not to remove it. He obviously believed that he had an absolute right to wear the union hat, and that Respondent could not lawfully order him to remove it. Therefore it is simply ludicrous to believe that Davis would have complied with Respondent's request to remove the hat, if Respondent's officials had merely—handed him or offered to give him a produce warehouse hat.

I have considered the termination notice prepared by Delmonte immediately after the event, which as the General Counsel correctly points out, makes no mention of either Ruperto or Delmonte instructing Davis to put on a produce warehouse hat. However, I find this omission insignificant, and overcome by the credible testimony of Delmonte and Ruperto and Bell's termination report, as described above. In my view, the failure of Delmonte to include the fact that Davis was told to put on the produce warehouse hat in his report, is attributable to the relative unimportance of that fact in Davis's actions. The discussion centered primarily on the removal of the union hat, and Davis's insistence that he had a right to continue to wear it. The question of substituting a produce warehouse hat was clearly not a major issue in anyone's mind, since in my view everyone knew that if Davis removed the Local 342 hat, he would either be supplied with a produce warehouse hat or wear his own. I note in that connection that Davis never told Respondent that he had lost or did not have his produce warehouse hat at the time.

Furthermore, I note that Ruperto was no longer employed by Respondent at the time of the trial, and in fact had recently quit because he was dissatisfied with his bonus. Therefore, he has no interest in the outcome of this proceeding, and would have no reason not to testify truthfully, which I find that he has done. Also, I note that Ruperto candidly admitted that he made the comment to Davis, to tell a union official that "it won't be that easy." Ruperto admitted further that he was referring to Union organizing by that remark, and that he knew that Davis was attempting to organize for the Union by wearing the union hat. I find that these admissions, which would tend to be damaging to Respondent's case, demonstrate to me that Ruperto was being truthful in the rest of his testimony, including his assertion that he told Davis to put on a produce warehouse hat.

Finally, I also note that since the record establishes that it is a violation of the Board of Health rules for a butcher to be without a hat, I find it unlikely that Respondent would order Davis to remove one hat without telling him to replace it with another hat.

On July 6, Respondent sent a letter to Davis, making an unconditional offer to return to work, which adds that he is expected to wear a full uniform provided by Respondent. Davis accepted this offer by letter from the Union's attorney on August 19.

The Respondent defends its decision to terminate Davis based on its alleged enforcement of a uniform policy as set

forth in its employee manual. The General Counsel concedes that this letter was a valid offer of reinstatement to Davis. In pertinent part, the manual reads as follows:

> All store employees are expected to wear the appropriate uniform. For the Deli and Meat Departments, the uniform consists of a white-collar shirt with sleeves, Produce Warehouse white coat, red apron, a Produce Warehouse red hat and nametag. All other employees must wear a white-collar shirt with sleeves, Produce Warehouse vest, and a nametag. If you are wearing a hat, you must wear a Produce Warehouse hat with the logo facing forward. These items must be clean and neat. All shirts must be tucked in. No bandanas, chains, visible body piercing, or exposed skin in an unprofessional manner . . . . If your manager feels your dress is not appropriate you may be asked to leave your workplace until you are properly dressed. You will not be paid for the time you are off the job for this purpose. Your manager has the sole authorization to determine whether or not you are dressed appropriately and anyone who violates the standard will be subject to appropriate disciplinary action.

According to Respondent's president, Raitses, this policy was instituted sometime in early 1997, because he and his partner decided to maintain a policy that employees dress should be neat, clean, and uniform in order improve Respondent's public image.

While Davis testified that he was not familiar with the employee manual or its contents with regard to uniforms, he does admit that in October 1997, Respondent distributed produce warehouse hats to employees, and informed employees that they were required to wear these hats every day. Davis further admits that since that time, both he and other employees in the store wore these produce warehouse hats on a regular basis.

Davis also furnished testimony however that there were some occasions where both he and other employees were permitted to wear personal hats for various periods of time without being disciplined by Respondent. According to Davis, Respondent's practice was to permit employees to wear their own personal hat if they forget to bring or lost their produce warehouse hat. However, he admits that normally, when an employee wears their own hat, Respondent's manager would approach them, and bring the employee a produce warehouse hat, and tell them to remove their personal hat and wear Respondent's hat.

Davis specifically recalled one occasion in early 1998, when Respondent hired a new meat wrapper. At that time, Ruperto gave the meat wrapper Davis's produce warehouse hat to wear, and he (Davis) wore a hat with the logo East Hampton on it. Davis claims that he wore this hat for about a week, until Bell came over to him, brought him a produce warehouse hat and instructed Davis to remove his personal hat and put on Respondent's hat. On another occasion, Davis testified that he lost his Produce Warehouse hat, and again wore the East Hampton hat for 2 days, after which again Bell told him to take the East Hampton off and put on a produce warehouse hat, which Bell handed him at the time.

Davis also testified that another butcher, Al Tischler wore a New York Yankee hat for about a week, although Davis could not recall when this occurred. After seeing Tischler wear the Yankee hat for a week, Davis asserts that he saw Bell bring Tischler a produce warehouse hat and instruct Tischler to remove his Yankee hat and wear Respondent's hat. Tischler allegedly complied with Bell's request.

Fred Steiniger, an organizer for the Union also furnished some testimony on this subject. He asserts that he visited the Coram store in connection with his organizing efforts, and on three occasions he observed employees wearing nonproduce warehouse headgear. These three instances allegedly involved one employee wearing a Jets hat, and another employee wearing a bandana on two separate occasions. According to Steiniger, both of these employees were employed in the meat department, and he saw them for about 10–15 minutes.

However Steiniger could not be sure whether a manager observed these employees wearing this noncompany headgear, although he states that the manager at the time was standing at the cashiers, 15 feet away from the meat department, from where the manager could have seen these employees.

According to Respondent's witnesses, Bell, Delmonte and Ruperto, if an employee wears a nonproduce warehouse hat, Respondent will supply them with a produce warehouse hat, and the employee will be told to remove their personal hat and wear Respondent's hat. If for some reason, Respondent does not have one of its own hats available, it will on occasion supply the employees with a plain white hat to wear.

Bell testified that he did not recall ever seeing Tischler wearing a Yankee hat, or any employee wearing a Jets hat or an East Hampton hat. Tischler did not testify.

Bell did testify however, that one employee in the meat department, Vinnie Mealy, had shaved his head, and asked Bell for permission to wear a red bandana under his Produce Warehouse hat, so he could keep his head warm. Bell testified that he felt that this request was reasonable and within company policy, so he granted Mealy permission to wear the bandana under his hat. Delmonte corroborated Bell's testimony that an employee was given permission by Bell to wear a bandana under his hat, and that the employee regularly did so.

Also, Raitses testified that although Respondent's manual policy is based on a desire for uniformity of employees, it has not enforced the manual requirement that employees wear white shirts. Raitses explains that Respondent did not enforce the manual requirement with respect to white shirts, because Respondent did not supply white shirts to employees, as it does with company vests, coats, aprons, and hats that Respondent does supply. Thus Respondent does not feel, according to Raitses that it is morally right to force an employee to buy a white shirt if they do not have one. However, with respect to items that it does supply such as hats and vests, Raitses asserts that it can and has strictly enforced its manual policy that employees wear these items at all times.

III. ANALYSIS

It is well established that an employee has the protected right to wear union insignia while at work. *Republic Aviation*, 324 U.S. 793, 801–803 (1945). However, an employer can lawfully restrict employees from wearing union insignia if it demonstrates the existence of "special circumstances." *United Parcel Service,* 312 NLRB 596, 597 (1993), enf. denied 41 F.3d 1068 (6th Cir. 1994). One of the special circumstances that has been recognized is where the display of union insignia unreasonably interferes with a public image which the employer has established, as part of its business plan, through appearance rules for its employees. *United Parcel*, supra; *Nordstrom Inc*., 264 NLRB 698, 700 (1982); *Evergreen Nursing Home*,198 NLRB 775, 778–779 (1972); *United Parcel Service*, 195 NLRB 441 (1972); *Houston Coca Cola Bottling Co*., 256 NLRB 520, 524

(1981). However, in this connection, the Board continues to hold the view, that mere employee contact with customers does not, standing alone, justify an employer prohibiting the wearing of union insignia. *United Parcel*, supra at 507; *Nordstrom,* supra; *Florida Hotel of Tampa*, 137 NLRB 1484 1962), enfd. as modified on other grounds 318 F.2d 545 (5th Cir. 1963).[3] "Rather, the entire circumstances of a particular situation must be examined to balance the potentially conflicting interests of an employee's right to display union insignia and on employer's right to prohibit such display." *Nordstrom*, supra at 700.

The Board deals with a myriad of factors in balancing these rights. One of the more significant factors in this assessment is the size or unobtrusiveness of the particular union insignia involved. *United Parcel Service*, supra, 312 NLRB at 597 (union pin found to be small, inconspicuous, and free of provocative message. The Board found that pin did not unreasonably interfere with employer's desired public image, and that it had not established special circumstances sufficient to justify prohibition. The Board distinguishes the prior case involving the same employer, 195 NLRB 441, 450 where the Board upheld employer's prohibition of a much larger pin).

Thus where the item involved is a hat which includes a union insignia, which is clearly not small or unobtrusive, such displays can lawfully be prohibited by an employer, pursuant to the enforcement of an established and nondiscriminatory uniform rule. *Meijer Inc.,* 318 NLRB 50, 57 (1995), *Sears Roebuck & Co.,* 300 NLRB 804, 806 (1990); See also *Noah's New York Bagels,* 324 NLRB 266, 275 (1997) (rule prohibiting wearing buttons invalid, but rule requiring the wearing of company T-shirts valid).

Based on the above summary of the applicable law, I find that Respondent's rule requiring the wearing of company hats as a part of its uniform policy to be a valid special circumstance and an exception to the general right of an employee to display union insignia. Indeed General Counsel does not contend to the contrary, but instead argues that although the rule itself may be valid, it cannot be discriminatorily or disparately enforced. *Williamette Industries,* 306 NLRB 1010 fn. 2 (1992), *Sears Roebuck,* supra. Moreover, if the valid policy has been disparately enforced, this is itself an unfair labor practice, which means that any defense that an employee was insubordinate by refusing to comply *Sears Roebuck* with a request to remove the hat must be rejected, supra at 810.

While I agree with the General Counsel's citations as to the applicable law on this subject, I do not believe that this record has established sufficient evidence of discriminatory enforcement of Respondent's valid uniform policy to warrant a finding of unlawful conduct by Respondent.

I do agree that a prima facie case of discriminatory motivation in Respondent's decision to terminate Davis has been established, by virtue of the timing of the discharge, Ruperto's admission that he knew that Davis was organizing for the Union by wearing the union hat, and Ruperto's comment to Davis to tell a union official that "its not going to be that easy."[4]

The burden than shifts to Respondent to demonstrate that it would have taken the same action, absent Davis' union activity. *Wright Line*, 251 NLRB 1083 (1980). This issue is largely dependent on resolution of the issue of whether Respondent has shown a consistent uniform application of the policy in issue. *Sears Roebuck,* supra. I conclude that Respondent has made such a showing, based on the credible, consistent, and essentially mutually corroborative testimony of Ruperto, Delmonte, Bell, and Raitses. That testimony which has not been significantly contradicted by the General Counsel's witnesses establishes that Respondent requires employees to wear various items of company supplied clothing, such as vests, coats, aprons, and hats, and that whenever it sees an employee violating this policy by wearing personal items instead of Respondent's authorized item, it orders such employee to remove their personal item and put on the company article of clothing.

The General Counsel did present some evidence of alleged discriminatory enforcement of Respondent's policy. However, I find such evidence to be insubstantial and unpersuasive. Thus Davis testified that he observed employee Al Tischler wearing a Yankee hat for about a week. Notably he furnished no testimony that Bell or any other supervisor observed Tischler wearing the hat during this period of time, and did nothing about it. What Davis did testify to however, was that he did observe and heard Bell instruct Tischler to remove the Yankee hat and put on Respondent's hat.

Similarly, Davis also testified that he wore a hat with an East Hampton logo, on two occasions, for periods of 2 days to a week. In each case however, he admits being told by Bell to remove the East Hampton hat, and replace it with the Respondent authorized hat previously distributed to employees.

Steiniger's testimony that he saw two employees for 10–15 minutes wearing a Jets hat or bandana is totally worthless, since he could not testify that any supervisor observed these events. With respect to the bandana, I credit the corroborative and logical testimony of Bell and Delmonte, that Bell gave permission to an employee to wear a bandana, under his company authorized cap, because the employee requested permission due to having shaved his head.

Although this is on its face inconsistent with Respondent's written policy, which forbids the wearing of bandanas, I find that the credible reasons given by Respondent to allow an exception in this one case, particularly where the bandana was covered by Respondent's authorized hat, convinces me that this deviation from policy, does not indicate discriminatory enforcement of Respondent's uniform requirements.

I find similarly with respect to Respondent's admission that it did not enforce the requirement in its manual that employees wear white shirts. I conclude that Raitses's credible explanation that Respondent did not enforce this requirement because it did not, unlike the hats and vests, supply these items to employees, to be sufficient to dissipate any inference that the difference in treatment of these articles of clothing by Respondent was motivated by union or other unlawful considerations.

The General Counsel places strong emphasis on the testimony of Davis, which was not substantially contradicted by Respondent's witnesses, that in past cases of enforcement of

[3] I note however that this position has been rejected by some circuit courts. *Burger King v. NLRB*, 725 F.2d 1053 (6th Cir. 1984); *United Parcel,* supra at 41 F.3d 1068 (6th Cir. 1994); *NLRB v. Harrah's Club* 337 F.2d 177, 180 (9th Cir. 1964).

[4] I note however that although a reasonable interpretation of this remark, would indicate antiunion animus, i.e., anyone who organizes will be terminated, the statement could be subject to a benign interpretation. Thus, it could be inferred that all Ruperto was saying was that the Union would not be able to organize by wearing union hats, because Respondent would simply enforce its lawful rule to prohibit such conduct, and if necessary discharge employees who refuse to comply with an order to follow such rules.

the policy, Respondent's officials would normally physically bring a replacement hat to the offending employees and offer it to them, while ordering the employees to remove their personal hats. The General Counsel contends that constitutes significant evidence of disparate and discriminatory enforcement of Respondent's policy, which warrants the conclusion that Respondent's conduct was unlawful. He notes further that Ruperto admitted in his testimony that "well, maybe I should have offered him a hat." Thus it is argued that the failure to do so constituted an abandonment of Respondent's prior practice of offering a replacement hat, and manifests a discriminatory application of the policy with regard to Davis. I do not agree.

In my view, the failure to physically offer Davis a replacement hat was an insubstantial deviation from Respondent's past procedures in enforcing the rule, having no bearing on the determinative issue in question. That is, whether the decision of Respondent to enforce the rule was discriminatorily motivated. I do not believe that the relatively minor issue of whether Respondent physically brought or offered Davis a replacement hat is pertinent to the issue of its motivation for enforcing the policy in the first place against Davis. Clearly, the question of the availability of a replacement hat had no bearing on the decision of Davis to refuse to remove the union hat and put on Respondent's hat, or the Respondent's decision to issue these instructions to him or to terminate him when he refused to comply. Ruperto credibly testified that he did not offer Davis a replacement hat because he believed that Davis had a company hat and Davis did not ask for one. This was a quite reasonable and logical position to take, since it is clear and must have been clear to Ruperto, that Davis had no intention of removing the union hat. Davis did not indicate that he did not have his company hat, or that he would have complied with Ruperto's instructions if he had one. Indeed I discredited Davis' preposterous testimony that he would have done so, in view of Davis's assertion that he was wearing the hat because he believed in the Union. Therefore the issue of the availability of the replacement hat was a nonissue, having no bearing on anyone's conduct in this matter.

This "deviation," is clearly unlike the departures from past practice, which the Board has found to be discriminatory, such as in *Sears Roebuck,* supra, where the evidence revealed that employees had worn noncompany hats for substantial periods of time, in the presence of supervisors. That evidence establishes that the Employer tolerated the wearing of hats which clearly violated the Employer's uniform policy, while enforcing it discriminatorily, when the employees chose to violate the policy while wearing union hats. That is not the case here, since the failure to physically supply a replacement hat is not significant or the same as the relevant issue of the decision to enforce the policy itself.

In that connection, the evidence disclosed above, established at most an occasional lapse in an otherwise consistent enforcement of a detailed uniform policy, which is insufficient to establish inconsistent or discriminatory enforcement. *Hertz Corp*., 305 NLRB 487, 488(1991); *United Parcel,* supra, 195 NLRB at 450, and *Kendall Co*., 267 NLRB 963, 965 (1983). Accordingly, I conclude that since Respondent has demonstrated that its action to enforce its generally consistent policy as to Davis was not discriminatorily motivated, then his refusal to comply with a lawful order of Respondent constituted insubordination warranting his termination. Cf. *Sears Roebuck*, supra. Therefore Respondent has met its burden of establishing to my satisfaction, that it would have discharged Davis, absent his union activities, or put another way, if Davis had refused to remove any personal hat and replace it with Respondent's hat.

Based on the foregoing, I shall recommend dismissal of the complaint.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not violated the Act in any manner as alleged in the complaint.

Based on the above findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

It is ordered that the complaint be dismissed in its entirety.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.